

STATE OF MICHIGAN

SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS,
SAGINAW VALLEY AREA CHAPTER, a Michigan
Non-Profit Corporation,
Plaintiff/Appellant,

-vs-

Lower Docket Case No.
00-2512-CL-L

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Department of Consumer & Industry Services and
NORMAN W. DONKER, Midland County
Prosecuting Attorney,
Defendants/Appellees,
and

Court of Appeals Docket No.
234037

Supreme Court No. 124835

MICHIGAN STATE BUILDING & CONSTRUCTION
TRADES COUNCIL,
Intervenor/Defendant/Appellee,
and

MICHIGAN CHAPTER OF THE NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION, INC.,
a Michigan Corporation, MICHIGAN MECHANICAL
CONTRACTORS ASSOCIATION, a Michigan Corporation,
and MICHIGAN CHAPTER OF THE SHEET METAL
AIR CONDITIONING CONTRACTORS NATIONAL
ASSOCIATION, a Michigan Corporation,
Intervenors/Defendants/Appellees,
and

MICHAEL D. THOMAS, Saginaw County
Prosecuting Attorney,
Intervenor/Appellee.

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SUPPLEMENTAL BRIEF TO PLAINTIFF/APPELLANT'S, ASSOCIATED BUILDERS
AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER ("ABC"),
APPLICATION FOR LEAVE TO APPEAL

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**SUPPLEMENTAL BRIEF TO PLAINTIFF/APPELLANT'S, ASSOCIATED BUILDERS
AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER ("ABC"),
APPLICATION FOR LEAVE TO APPEAL**

INTRODUCTION

On October 20, 2003, Plaintiff-Appellant, Associated Builders and Contractors, Saginaw Valley Area Chapter ("ABC"), filed its Application for Leave to Appeal to this Court. In its Application, ABC has requested that this Court reverse the decision of the Court of Appeals, which overruled the trial court and dismissed ABC's constitutional challenges to the Michigan Prevailing Wage Act, MCL 408.551, *et seq.* The Court of Appeals erroneously concluded that ABC has not presented any justiciable case or controversy. Through this brief and its Application for Leave to Appeal filed October 20, 2003, ABC can show that the Court of Appeals should be reversed because it applied an improper legal standard and reasoning in dismissing ABC's claims.

In its Application, ABC addressed the flawed basis for the Court of Appeals decision and why it was incorrect. ABC now files this supplemental brief to further address the question of whether a case or controversy exists in this case. It is ABC's contention that a case or controversy exists in this matter not only under the traditional analysis applied in constitutional challenges, but also under the principle of associational standing. Accordingly, ABC respectfully requests that its Application for Leave to Appeal be granted.

LEGAL ANALYSIS

I. CONTROLLING LEGAL PRECEDENT DEMONSTRATES THAT ABC SATISFIES THE CASE OR CONTROVERSY REQUIREMENT THROUGH THE DOCTRINE OF ASSOCIATIONAL STANDING BECAUSE THE PREVAILING WAGE ACT IMPOSES A JUDICIALLY RECOGNIZABLE INJURY IN FACT UPON ABC'S MEMBERS

Inherent in every litigation case is the question of whether the litigant has an identifiable stake in the outcome of the case sufficient to warrant the court deciding the merits of the case or issue presented. Elk Grove Unified School District v Newdow, 2004 US Lexis 4178, 124 S Ct 2301, 159 L Ed 2d 98 (2004). This standing requirement is, in effect, a limit on the judiciary and the types of questions it may entertain. The United States Supreme Court has described the standing requirement as balancing “the heavy obligation to exercise jurisdiction . . . against the deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary.” Elk Grove at 2308. There are two strands of standing jurisprudence: Article III standing,¹ which enforces the Constitution’s “case or controversy” requirement, and prudential standing, which has been explained as “judicially self-imposed limits on the exercise of federal jurisdiction.”² Allen v Wright, 468 US 737, 104 S Ct 3315, 82 L Ed 2d

¹ Although Article III standing concerns the U.S. Constitution, Michigan standing jurisprudence has developed on a parallel track. The Michigan Constitution specifically vests judicial power within the Courts, Const. 1963, Art. 6, §1, and expressly directs that legislative, judicial, and executive powers be separate. Const. 1963, Art 3, §2. As early as 1859, the Michigan Supreme Court interpreted this language to mean that “the judicial power of the courts is generally understood [as] the power to hear and determine *controversies* between adverse parties” Daniels v People, 6 Mich 381 (1859). Thus, federal case law is instructive to this issue.

² The U.S. Supreme Court has explained prudential standing as “the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches” Elk Grove at 2308. Thus, prudential standing addresses the division of power between the executive, judicial, and legislative branches of government, and the Court’s inability to exceed the boundaries of its power. As this case involves an analysis of the Constitutionality of the

556 (1984). The Michigan courts regularly rely upon case precedent interpreting “standing” under the federal Constitution when addressing issues of standing under the Michigan Constitution. *See* License Beverage Ass’n v Behnan Hall, Inc., 82 Mich App 319 (1978); White Lake Ass’n v Whitehall, 22 Mich App 262 (1970); Fieger v Ins. Comm’r, 174 Mich App 467 (1988); Killeen v Wayne Co. Road Comm., 137 Mich App 178 (1984). The present Application for Leave to Appeal is concerned with the “case or controversy” requirement and whether ABC has alleged facts in its complaint sufficient to establish a case or controversy warranting the Court’s review. It is ABC’s belief that it has met this requirement, not only through traditional standing analyses (fully explained in its Application for Leave to Appeal), but also through the doctrine of associational standing.

It is well settled that to establish a case or controversy, the Plaintiff must show that “the conduct of which he complains has caused him to suffer an ‘injury in fact’ that a favorable judgment will redress.” Elk Grove at 2308. *See also* Lujan v Defenders of Wildlife, 504 US 555, 119 L Ed 2d 351, 112 S Ct 2130 (1992); Warth v Seldin, 422 US 490, 95 S Ct 2197, 45 L Ed 2d 343 (1975). The Michigan Supreme Court has specifically adopted this case or controversy test as established by the U.S. Supreme Court. *See* Lee v Macomb County Board of Commissioners, 464 Mich 726 (2001); National Wildlife Federation & Upper Peninsula Wildlife Council v Cleveland Cliffs Iron Ore Company, 471 Mich 608 (2004). This requirement ensures that the parties will engage in sincere and vigorous advocacy during the litigation. Muskegon Building & Construction Trades v Muskegon Area School District, 130 Mich App 420 (1983), *overruled in part*, Western Michigan University v State of Michigan, 455 Mich 531 (1997).

Michigan Prevailing Wage Act, which is properly within this Court’s purview, prudential standing is not an issue in this case.

In the present case, ABC has brought suit on behalf of its members – construction contractors located primarily in the Saginaw Valley area of Michigan. Significantly, under the doctrine of associational standing, an organization may have standing to assert the claims of its members even if the organization itself has suffered no direct injury. Associated Builders and Contractors v Perry, 1994 US Dist Lexis 8437 (ED MI 1994), *rev'd other grounds*, 115 F3d 386 (6th Cir 1997). The United States Supreme Court has set forth the requirements for an association to establish associational standing as follows:

An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v Washington State Apple Advertising Corp., 432 US 333, 97 S Ct 2434, 53 L Ed 2d 383 (1977). If the association establishes these factors, it has presented a case or controversy and “is entitled to invoke the Court’s jurisdiction.” Warth v Seldin, *supra*, at 511. Michigan law is in accord. See White Lake Improv. Ass’n v Whitehall, *supra* at 262; Trout Unlimited Muskegon – White River Chapter v White Cloud, 195 Mich App 343 (1992). In fact, in the Michigan Supreme Court’s most recent decision addressing associational standing, National Wildlife Federation & Upper Peninsula Wildlife Council v Cleveland Cliffs Iron Ore Co, 471 Mich 608 (2004), the Michigan Supreme Court conferred associational standing on a plaintiff environmental group based upon injuries suffered by its members. Cleveland Cliffs at 630.

In ABC v Perry, *supra*, a case remarkably similar to the present one,³ the District Court for the Eastern District of Michigan held that the Saginaw Valley Area Chapter of ABC had

³ In the present case, ABC has named Kathleen Wilbur, the Director of the Department of Labor and Economic Growth (formerly the Department of Consumer and Industry Services) as a

associational standing sufficient to maintain a declaratory action challenging the enforceability of the Prevailing Wage Act. The District Court in Perry began its evaluation of associational standing and its determination of whether the case or controversy requirement was met, by explaining that to maintain the litigation, “ABC must show concrete injury to itself or its members.” Perry at 7. The Court further explained the necessity of this requirement by stating “the requirement of injury is a rough attempt to put the decision of whether or not review will be sought in the hands of those who have a direct stake in the outcome.” Perry at 7. In holding that ABC did, in fact, have associational standing and that the case or controversy requirement was met, the District Court explained:

In the instant case . . . at least one ABC member has filed a declaration stating that, as a general contractor, it has been subject to state prevailing wage laws on jobs that it has performed in the last five years The member alleges that, when applicable, it has complied with the mandates of the Act so as to avoid criminal prosecution, that the Act has forced him to constantly monitor the work of employees; that he has been required to recalculate the wage and fringe benefit rates for each employee based upon that employee’s performance of a task within another job classification, and that he cannot competitively bid on those state projects which are subject to the Act without altering his administrative scheme of employee benefit plans. These alleged consequences are sufficient to satisfy the injury in fact requirement In short, at least one of ABC’s members has suffered the requisite “injury in fact” that is likely to be redressed by a favorable decision. Thus the Court holds that Wolgast (and thus ABC) has Article III standing to pursue its claim

Defendant. In the Perry case, Defendant Perry was Director of the Department of Labor, the predecessor to the Department of Consumer and Industry Services. Therefore, the parties in both the present matter and the Perry case are identical. The Perry case alleged that the Prevailing Wage Act was preempted by the Employee Retirement Income Security Act, 29 USC 1001 *et seq.*, and, therefore, that case involved a constitutional challenge to the Prevailing Wage Act under the Supremacy Clause of the U.S. Constitution. In the present case, ABC is also challenging the constitutionality of the Prevailing Wage Act. However, most importantly, the intervenors in the Perry case specifically challenged ABC’s standing to bring its constitutional challenge to the Prevailing Wage Act, which is also at issue in this present appeal. The Perry decision, therefore, provides a persuasive road map for the analysis of the standing issues raised in the present case.

Perry at 8-10. Although the substantive issue in the Perry case, whether Michigan's Prevailing Wage Act is preempted by the Employee Retirement Income Security Act, 29 USC 1001 *et seq.*, was subsequently reversed by the Sixth Circuit, the District Court's determination that ABC had associational standing, and that the case presented a justiciable case or controversy, was left undisturbed.⁴ Incredibly, despite the clear holding of the federal court that ABC had associational standing to prosecute its previous constitutional challenge to the Prevailing Wage Act, the Court of Appeals dismissed ABC's present lawsuit without any mention of the Perry case, let alone any attempt to distinguish it. The Court of Appeals' unawareness of the Perry decision and of the federal court's finding of associational standing further demonstrates the erroneous nature of the Court of Appeals' dismissal of ABC's present case.

In addition to the Perry case, the Court of Appeals also ignored its own legal precedent concerning associational standing in cases involving the Prevailing Wage Act. For example, in Muskegon Building and Construction Trades v Muskegon Area Intermediate School District, *supra*, the plaintiff, a trade association representing various craft and trade unions, filed suit seeking injunctive relief requiring the defendant school district to comply with the terms of the Prevailing Wage Act. Muskegon at 423. The trial court granted the plaintiff's request for injunctive relief, and the defendant appealed, alleging that the plaintiff lacked standing to maintain the action because it had not suffered any injury. In reviewing the matter, the Court of

⁴ It should be noted that various other state and federal Courts have repeatedly held in a variety of situations that ABC does have associational standing to protect the interests of its members. See ABC v City of Rochester, 67 NY 2d 854 (NY 1986); ABC v San Francisco Airports Com., 21 Cal 4th 352 (CA 1999); Connecticut ABC v Anson, 251 Conn 202 (Conn 1999); ABC v Perry, *supra*; Pelican Chapter, ABC v Edwards, 128 F3d 910 (5th Cir 1997); Northern Chapter of ABC v Gateway Economic Development Corp., 1992 US Dist Lexis 7348 (ND OH 1992).

Appeals rejected the defendant's arguments, finding that the plaintiff had alleged facts sufficient to create a case or controversy merely because the plaintiff union:

. . . was organized as a representative association to enhance the political and economic power of its trade organization members and, ultimately, the individual members of these trade organizations. Clearly . . . plaintiff has a direct interest in defendant's compliance with the Prevailing Wage Act since its existence and health is dependent upon the existence and health of its member organizations, which organizations will wither or die if they are unable to effectively protect their members.

Muskegon at 427-28. Thus, the Court of Appeals found that the plaintiff union could properly prosecute the case at issue. Muskegon at 428.

If the Court of Appeals found a sufficient case or controversy in the economic interests espoused by the union associations in the Muskegon case, logic and reason dictate that an association made up of employers such as ABC, whose members are subject to criminal enforcement of the Prevailing Wage Act, must have at least an equal case and controversy to establish associational standing. This is particularly true given the fact that unlike ABC's individual members, none of the plaintiff union trade association members in the Muskegon case are regulated by or subject to the enforcement provisions of the Prevailing Wage Act, as that law is enforced exclusively against employers.⁵ In addition to the Muskegon case, Michigan courts have routinely permitted construction trade union associations to either maintain or join in actions involving the Prevailing Wage Act. See Western Michigan University v State of Michigan, 455 Mich 531 (1997) (Building & Construction Trades Council permitted to intervene

⁵ Moreover, the true irony of the Court of Appeals' decision in the Muskegon case, *supra*, is that the Court of Appeals found that the plaintiff in Muskegon, an association of construction unions, had established a sufficient case or controversy to enable the plaintiff to basically *enforce* the Prevailing Wage Act, a criminal statute. Muskegon at 428. In Diamond v Charles, 476 US 54; 106 S Ct 1697; 90 L Ed 2d 48 (1986), the United States Supreme Court subsequently held that

seeking enforcement of the Prevailing Wage Act); Michigan State Building Trades & Construction Council v Perry, 241 Mich App 406 (2000) (union permitted to maintain an action seeking enforcement of the Prevailing Wage Act); IBEW v McNulty, 214 Mich App 437 (1995) (union permitted to maintain action enforcing the Prevailing Wage Act); West Ottawa Public Schools v Babcock, 107 Mich App 237 (1981) (union permitted to intervene as a defendant in a case challenging the constitutionality of the Prevailing Wage Act). In none of these cases, nor in the present case, did the Court of Appeals feel compelled to *sua sponte* address the standing of the union trade associations to maintain the litigation in question. This is in sharp contrast to the present case, wherein the Court of Appeals has held, without briefing from the parties, that ABC lacks standing in the present matter despite the fact that its members, unlike the unions' members, are exposed to criminal liability for violating the Prevailing Wage Act. Such hasty and inconsistent decision-making by the Court of Appeals which completely ignores associational standing issues not only denies ABC its day in court, but also leads to inconsistency and unnecessary confusion in what has been a fairly well-settled area of Michigan constitutional jurisprudence.

In the present matter, ABC demonstrated that its members have suffered an injury in fact through the application of the Prevailing Wage Act, and that it is proper for ABC to represent the interests of its members in this litigation. In its circuit court Complaint, ABC averred that it is a trade association whose members are general contractors, subcontractors, builders, suppliers, and other businesses engaged in or associated with the construction industry. Complaint, ¶ 8. ABC was founded to promote the merit shop philosophy of free enterprise. Complaint, ¶ 8. On behalf

only a criminal prosecutor has sufficient interest in enforcing a criminal statute and that private parties can never have such an interest.

of its members, ABC is opposed to all legislation, including the Prevailing Wage Act, that is contrary to the principle that employees and their employers have the right to determine the level of compensation and working conditions on the job. Complaint, ¶ 8. ABC also specifically alleged in its Complaint that it has standing to bring this matter on behalf of its members because its members would otherwise have standing to sue in their own right; the interests ABC seeks to protect are related to the trade association's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Complaint, ¶ 9. If given the opportunity to engage in discovery, ABC would have been able to establish these allegations as facts.

Indeed, Judge Ludington of the Midland County Circuit Court found ABC to have sufficient standing to pursue its causes of action based merely upon the affidavits presented by ABC⁶ in response to Defendant Donker's motion for summary disposition challenging ABC's standing, *a matter that was not appealed by any of the litigants*. ABC has demonstrated through affidavits that ABC members are forced to abide by the Prevailing Wage Act if they wish to bid on state-funded building projects. ABC members have had, and continue to have, complaints filed against them with the Department of Labor and Economic Growth for alleged violation of

⁶ ABC acknowledges that in the passage of time since the inception of this lawsuit affiant Gary Tenaglia has closed his business, General Electric Contracting, Inc., and is, therefore, no longer a member of ABC. (See Exhibit F of ABC's Application for Leave to Appeal) However, as ABC has maintained throughout these proceedings, it was never necessary to have Mr. Tenaglia's testimony, as actual threatened criminal prosecution is not necessary to establish the existence of a case or controversy. In any event, discovery will support ABC's allegations in this case and ABC will be able to produce other ABC members who have been injured due to the Prevailing Wage Act.

the Prevailing Wage Act.⁷ In fact, ABC members are routinely referred to local prosecutors for criminal prosecution for their alleged failure to comply with the statute. (See Exhibit H to Application for Leave to Appeal). ABC members who perform work on prevailing wage jobs must constantly monitor and adjust their wage and benefit schedules in an attempt to comply with the myriad of wage classifications imposed by the Prevailing Wage Act, all the while knowing that even an unintentional violation of the Act could subject the business owner to criminal prosecution. It is abundantly clear that ABC members have been injured by the Prevailing Wage Act, and continue to be injured by the Act on a regular basis.⁸

The Court of Appeals clearly erred in determining that ABC failed to present a case or controversy sufficient to invoke the Court's jurisdiction. Through the theory of associational standing, ABC may assert the claims of its members who have been injured by the Prevailing Wage Act. Accordingly, ABC's Application for Leave to Appeal should be granted.

7 It should be noted that since the filing of the Complaint in this case, Governor Granholm signed as her first Executive Order upon taking office, EO 2003-01 which provides for debarment of contractors who have been found to violate the Prevailing Wage Act on two occasions. Debarment would have the obvious result of preventing contractors from participating in any state funded projects. (Exhibit A) This potential debarment is yet another injury which may befall ABC members.

8 As discussed more fully in ABC's Application for Leave to Appeal, the Court of Appeals found that no injury existed because no ABC member was threatened with "imminent prosecution." See Op. pg. 14. Therefore, the court incorrectly concluded that no case or controversy existed. Such convoluted reasoning ignores binding case precedent and interjects an impermissible additional factor into the court's analysis of standing. See ABC's Application for Leave to Appeal, pp 6-18.

II. THE COURT OF APPEALS FAILED TO CONSTRUE THE ALLEGATIONS IN THE COMPLAINT IN ABC'S FAVOR AS REQUIRED BY BINDING CASE LAW

In dismissing ABC's case for lack of standing, the Court of Appeals disregarded one of the most basic tenets of appellate jurisprudence, that "*for purposes of determining a plaintiff's standing, all pleaded allegations are to be accepted as true.*" Warth v Seldin, 422 US 490, 95 S Ct 2197; 45 L Ed 2d 343 (1975); Dodak v State Administrative Chair, 441 Mich 547 (1993). When evaluating issues surrounding the standing of parties, "*both the trial and the reviewing courts . . . must construe the complaint in favor of the complaining party.*" Warth at 501. This principle is especially important in evaluating the present case, as there has been absolutely no discovery conducted in this case and absolutely no indication that ABC's allegations with regard to the existence of a case or controversy are unfounded. By disregarding these fundamental principles of law, the Court of Appeals' decision in this case impermissibly deprives ABC of the right to have this matter adjudicated by the courts and, therefore, its erroneous decision should not be permitted to stand.

As the Warth and Dodak cases make clear, the Court of Appeals was required to accept the standing allegations contained within ABC's Complaint as true. These allegations include:

- That the Act is enforced through criminal proceedings (Complaint, ¶ 7);
- That ABC is a trade association whose members are general contractors, subcontractors, builders, suppliers and other business who are engaged in or associated with the construction industry (Complaint, ¶ 8);
- ABC was founded to promote the "merit shop" philosophy of free enterprise (Complaint, ¶ 8);
- On behalf of its members, ABC is opposed to all legislation, including the Prevailing Wage Act, which is contrary to the principle that employees and their employers have the right to determine the level of compensation and working conditions on the job (Complaint, ¶ 8);

- That ABC has standing to bring this matter because its members would have standing to sue in their own right (Complaint, ¶ 9);
- That the interests ABC seeks to protect are related to the trade association's purpose (Complaint, ¶9);
- That neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit (Complaint, ¶9);
- That ABC and its members have suffered harm through the enforcement of the Prevailing Wage Act (Complaint, ¶ 19).

When accepting these allegations as true, and construing the allegations in ABC's favor as required by binding case law, it becomes clear that ABC has met the necessary requirements to establish that an actual case or controversy exists. The Court of Appeals gave no indication in its decision that it accepted ABC's allegations as true. In doing so, the court obviously erred when it hastily determined that it lacked jurisdiction over this matter due to want of a case or controversy. Since the Court of Appeals' decision in this case is patently flawed it should be reversed by this Court.

III. ABC MEMBERS HAVE SATISFIED THE CASE OR CONTROVERSY REQUIREMENT BECAUSE THEY HAVE BEEN, AND CONTINUE TO BE, INJURED BY THE MERE FACT THAT THEY ARE FORCED TO COMPLY WITH AN UNCONSTITUTIONAL STATUTE AS A CONDITION PRECEDENT TO BIDDING ON PUBLIC WORKS CONSTRUCTION PROJECTS

In its Application for Leave to Appeal, ABC demonstrated the erroneous nature of the Court of Appeals' reliance on an "imminent prosecution" standard as the means by which ABC was to have established that a case or controversy existed in the present case. Through this supplemental brief ABC can show that the Court of Appeals completely ignored that, as a matter of law, the mere fact that ABC members must comply with an unconstitutional statute is, in and

of itself, an injury sufficient to establish the existence of a case or controversy. The Court of Appeals' complete disregard for yet another basic tenet of constitutional standing law is clearly erroneous, and requires reversal by this Court.

The Court of Appeals' error is aptly illustrated by the United States Supreme Court's decision in the case of Northeastern Florida Chapter of the Associated General Contractors of America v City of Jacksonville, 508 US 656, 113 S Ct 2297, 124 L Ed 2d 586 (1993) ("AGC"). In AGC, the plaintiff, like ABC in the present case, was a construction contractors' association which challenged a city ordinance that gave preferential treatment to minority contractors when awarding construction contracts. AGC at 658. AGC alleged that the statute was unconstitutional both on its face and as applied, and that it violated the Equal Protection Clause of the 14th Amendment. AGC at 659. The case was dismissed for lack of standing by the Court of Appeals after the Court concluded that the petitioner failed to allege that one or more of its members would have been awarded a contract but for the challenged ordinance. According to the Court of Appeals, the AGC, therefore, had not demonstrated that it had suffered a sufficient injury. AGC at 659.

The Supreme Court overruled the Court of Appeals, holding that the mere fact that an allegedly impermissible barrier was erected by the government in the award of contracts constituted sufficient injury to establish plaintiff's standing to sue. AGC at 666. In this regard, the Supreme Court stated that "[t]o establish standing, therefore, a party. . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." AGC at 666. The Supreme Court found that as the plaintiff demonstrated that its members regularly bid on construction projects and would have bid on

contracts offered pursuant to the city ordinance if they were able to do so, the plaintiff had in fact suffered an injury which was reviewable by the Court. AGC at 668-9.

The AGC case is important because it reaffirms that *the mere fact that a contractor is forced to comply with an unconstitutional statute* before being able to work on a public project *is an injury in and of itself sufficient to establish standing*. Thus, the Court of Appeals' requirement in the present case that ABC demonstrate some other, additional injury in order to establish the existence of a case or controversy such as "imminent prosecution" is clearly erroneous.

The error by the Court of Appeals in this regard is made all the more glaring by the obvious parallels between the AGC case and the present matter. For example, both of these cases deal with an association of construction contractors who brought constitutional challenges to construction bidding statutes. Both cases involve allegations of an unconstitutional condition precedent to bidding on a public project. In both cases, the injury is inherently prospective in that the injury will always be a potential injury or a threatened injury due to the inability to bid on the construction project in question without infringement of a constitutional right. Additionally, in both cases, the constructor association plaintiff alleged that its members regularly bid on construction projects and would have continued to bid on public projects but for the ordinance in question.

Not only are these factual issues the same in both cases, but the same flawed legal analysis was applied by the lower appellate courts in both cases. In the AGC case, the Court of Appeals raised the bar too high and linked standing with a required showing that one of the members of AGC actually lost out on a bid due to the unconstitutional ordinance. AGC at 664. Similarly, in the present case, the Court of Appeals is requiring that an ABC member suffer

actual or imminent criminal prosecution in order to demonstrate an injury sufficient to sustain a case or controversy.⁹ The Court of Appeals in AGC erred when it completely overlooked the prospective injury that a construction contractor in a bidding statute can suffer when unconstitutional preconditions are imposed.¹⁰ The Court of Appeals in the present case is equally wrong for applying the same flawed reasoning. Indeed, with respect to the issue of standing, the Court of Appeals in the present case seems to have myopically focused on criminal prosecutions for violations of the Prevailing Wage Act, which by necessity must take place after the statute is enforced, and completely ignored the prospective injury alleged by ABC in having to be subject to an unconstitutionally delegated and vague statute while risking potential prosecution.

The AGC case erases any doubt that ABC has established the existence of a case or controversy. Accordingly, ABC's Application for Leave to Appeal should be granted.

**IV. THE FOLLOWING ARE TECHNICAL CORRECTIONS TO ABC'S
CONSOLIDATED REPLY IN RESPONSE TO
DEFENDANT/APPELLEE'S AND INTERVENORS/
DEFENDANTS/APPELLEES' BRIEFS IN OPPOSITION TO
PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

It has been determined that some citation errors are contained within ABC's Consolidated Reply Brief. ABC therefore wishes to take this opportunity to provide the Court with the following citation corrections:

⁹ In its Opinion, the Court of Appeals stated: "We conclude that Plaintiff did not establish that there was an actual or imminently threatened prosecution of any of its members . . ." Opinion, pg. 14.

¹⁰ In this regard, the U.S. Supreme Court held: "The Court of Appeals held that petitioner could not establish standing because it failed to allege that one or more of its members would have been awarded a contract but for the challenged ordinance. Under these circumstances, the Court of Appeals concluded there is no 'injury.' This holding cannot be reconciled with our precedents." AGC at 664.

1. Carolene Products Co. v Thompson, p 2 of ABC's Reply Brief, correct citation is 276 Mich 172 (1936).
2. Fox v Board of Regents of the University of Michigan, p 15 of ABC's Reply Brief, correct citation is 375 Mich 238 (1965).
3. Kalamazoo Police Supervisor's Assoc. v City of Kalamazoo, p 6-7, 9-12 of ABC's Reply Brief, correct citation is 130 Mich App 513 (1983).
4. McGill v Automobile Association of Michigan, p 11 of ABC's Reply Brief, correct citation is 207 Mich App 402 (1994).

Additionally, on page 39 of ABC's Application for Leave to Appeal, at foot note 16, ABC cites the case of Department of Industrial Relations v Superior Court of Sacramento County. The citation for that case is Superior Court No. 97CS03102 (Nov. 2, 2000) (unpublished). A copy of that decision is attached to this supplemental brief at Exhibit B for this Court's access.

CONCLUSION

None of the Defendants or Intervenors appealed the Circuit Court's finding that ABC had standing to bring this cause of action, nor have they alleged on appeal that this case does not present a case or controversy. Nevertheless, the Court of Appeals addressed this "case or controversy" issue *sua sponte* and without the benefit of any briefing or input from the parties. In doing so, the court committed a clear error of law through application of an erroneous "imminent prosecution" standard to ABC's standing to sue. By way of this supplemental brief ABC has provided this Court with additional authority supporting ABC's position that it does, indeed, maintain standing to sue in its challenge to the constitutionality of the Michigan Prevailing Wage Act. Therefore, ABC respectfully requests that its Application for Leave to Appeal be granted in this matter.

Dated this 15th day of October, 2004.

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